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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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MAR 17 1997

In the Matter of )  
 )  
The Merger of MCI Communications ) GN Docket No. 96-245  
Corporation and British )  
Telecommunications plc )  
 )

**RESPONSE OF ACC CORP.**

**I. INTRODUCTION**

ACC Corp. (ACC), by its undersigned counsel, submits this Response to the Opposition and Reply Comments on the Application and Notification filed by MCI Communications Corporation (MCI) and British Telecommunications plc (BT) requesting approval by the Federal Communications Commission (FCC or Commission) of their application to transfer control of MCI to BT.

In its Comments, ACC urged the Commission to grant the merger application only on the condition that BT implement measures to ensure that it cannot leverage its control over bottleneck local and international facilities. BT/MCI, as well as the U.K. government, generally responded that the U.K. telecommunications framework has a unique history apart from the U.S., as well as separate objectives. Specifically, they contended that implementing an equal access regime or local loop unbundling would undermine the U.K.'s policy of encouraging the construction of alternative local loops. They also argued that a competitive marketplace and/or regulation by U.K. regulatory authorities would ensure that BT cannot distort competition through control of bottleneck submarine cable capacity, submarine cable stations, or backhaul facilities, to the detriment of competition in the U.S. international market.

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Given BT's continued control over access to bottleneck facilities, the FCC has a responsibility to prevent the combined BT/MCI entity from distorting competition in the U.S. international market. The FCC has this responsibility notwithstanding the existence of the United Kingdom's policy goals or regulatory requirements. Accordingly, it is imperative that the FCC condition its approval of the BT/MCI merger on BT's implementation of equal access and reasonable and nondiscriminatory access to backhaul facilities in the United Kingdom, to allow newer entities such as ACC to compete on equal terms with BT. ACC also agrees with other commenters that BT must be required to unbundle its local loops. Absent such regulatory conditions there will be an adverse impact on competition on the U.S. and U.K. markets for international services, particularly on the U.S.-U.K. route.

## **II. DISCUSSION**

### **A. *Equal Access***

The FCC should condition its approval of the BT/MCI merger on BT's implementation of equal access. The U.K.'s current requirement that BT provide only indirect access arrangements to competing U.S. carriers allows BT to require customers to dial additional digits on a per-call basis to access a provider other than BT. Since BT has the ability and the incentive to discriminate against unaffiliated carriers, ACC believes that the failure to mandate that BT provide equal access will allow BT to impair full and fair competition in the United Kingdom and therefore on the U.S.-U.K. route.

#### **1. The FCC should not rely on OFTEL's cost-benefit analysis to gauge the necessity of equal access with respect to BT**

OFTEL's cost-benefit analysis found that the cost of equal access outweighed its benefits.<sup>1</sup> Although the costs of equal access are easy to measure (*e.g.* the costs of system development and installation, equipment and staffing), the benefits of equal access are more difficult to quantify. While the study relied

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<sup>1</sup> OFTEL Statement, OFTEL's Policy on Indirect Access, Equal Access and Direct Connection to the Access Network, July 1996.

upon by OFTEL attempted to place a monetary figure on such benefits, as described below, ACC believes that this study underestimated the benefits of equal access.

As the study recognized, the benefits of equal access include lower prices, better quality services and greater innovation resulting from increased competitive pressure under an equal access system. In the United States, equal access helped to ensure that the Regional Bell Operating Companies ("RBOCs"), once divested from AT&T, could not discriminate against competitive long distance carriers in favor of AT&T. In the United Kingdom, BT is still the dominant provider of both local and long distance services. Equal access is thus even more critical to prevent BT from discriminating against competitive long distance carriers in favor of itself. Absent mandatory equal access, BT could hinder the ability of other carriers to compete with it by requiring customers to dial additional digits to access BT competitors. This would impair competition on the U.S.-U.K. route by providing BT/MCI with an unfair advantage

Moreover, ACC believes that long distance companies that would benefit from equal access would be willing to share the costs of implementing equal access. In the U.S. and in Canada, the incumbent long distance provider was not forced to bear the entire cost of implementation equal access. This cost has traditionally been incurred in part by carriers, such as ACC, that benefit from such equal access.<sup>2</sup> To the extent that regulatory agencies are concerned about the costs of converting to equal access, regulatory agencies should consider that BT would not be required to bear all of the costs of converting to equal access. Moreover, consumers would benefit substantially from equal access.

Even if the study relied upon by OFTEL accurately reflected the costs and benefits of equal access, the FCC must not be distracted from its primary objective -- to determine whether or not U.S. carriers can

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<sup>2</sup> Indeed, it is not just carriers such as ACC that would benefit from equal access. By enabling competition that would result in lower prices and more innovative services, equal access would spur demand for telecommunications services, to the benefit of consumers and the industry in general, including incumbent.

compete in the U.K. market on a level playing field, and therefore provide end-to-end services in the United States in competition with BT/MCI. With respect to BT, the U.K.'s system of indirect access does not provide U.S. carriers with such opportunities. As described below, while BT has the luxury of obtaining both customers that choose BT and customers that "default" to BT as their long distance and/or international carrier, indirect access long distance and international carriers can obtain only those customers that specifically choose them, and then only if those customers dial extra digits to access such competitive services. Given the clear handicap to free competition in the United Kingdom that BT's ability to provide unequal access represents, the FCC cannot allow BT to compete freely in the United States unless it requires BT to offer equal access as a condition.

**2. Without equal access, customers must dial extra digits**

In the U.K. market, the requirement that customers dial extra digits to access competitors' services provides BT with a competitive advantage that it has not earned. In order to convince BT's customers to switch to its services, a new entrant must provide a service that customers perceive as equivalent to that of BT. Customers may be less attracted to a new entrant's services, notwithstanding its higher quality or lower prices, because they must take extra steps to access it. Even those customers that have "switched" to the new entrant may forget to dial the additional digits required to access the new entrant's services and instead will access BT's services by default. Therefore, even if though the new entrant may succeed (through innovative services, better customer service or lower prices) in obtaining customers in both the commercial and residential markets, BT, *through its own failure to implement equal access*, still receives significant unearned "default" traffic from these "zero-billing" customers merely because the customers forget to dial additional digits required to access a competitor's services.

ACC has also considered offering its competitively priced, high-quality services to the residential market. The requirement that customers dial extra digits to access ACC's services, however, can hinder its

efforts to serve residential customers. As the FCC is well aware, the provision of service to residential customers is expensive because these customers typically are not high volume users. If BT's failure to provide equal access prevents ACC from obtaining a large enough customer base to sustain residential service, residential customers will be deprived of an increased choice in service providers, better quality service and reduced rates, and ACC will lack the ability to provide the same residential services in the United Kingdom that BT/MCI can provide in the United States.

**3. The need to use dialers will hinder ACC's ability to compete with BT on an end-to-end basis.**

In its reply comments, the U.K. government stated that programmed memory phones and "smart" phones minimize the inconvenience of dialing additional digits at little or no cost to the *customer*. ACC respectfully notes, however, that competitive providers such as ACC would be required to absorb the cost of these phones, dialers and other equipment as well as installation costs. The cost of dialers as well as their installation, maintenance, removal and repair is significant, especially for smaller customers. BT does not have to bear these costs, giving it an unfair advantage in the U.K. market deemed by OFTEL to be competitive. Competitors to BT thus lack in the United Kingdom the level playing field available to BT/MCI in the United States. This inequity undermines competition on the U.S.-U.K. route.

BT/MCI stated that by the end of June 1996, indirect access resale carriers obtained 22% of the U.K. business market for international calling service. BT/MCI does not state whether its measurement of this market share was based on revenues or customer base. If this figure is based on number of customers, it is not a true measure of resellers' ability to compete with BT. Competitive carriers in the United Kingdom must incur additional costs for equipment such as dialers and memory phones to provide seamless service as discussed above. Their percentage of revenues in the market may therefore be significantly less than indicated by BT/MCI's figures. If the U.K. implements equal access, however, the market share for ACC

and other competitive resellers would be even higher, reflecting their success in providing quality services and excellent customer service at reasonable prices. A competitor's ability to compete should not be determined by an artificial access structure resulting from BT's market power.

To the extent that ACC seeks to offer its services to residential customers, the incremental cost of purchasing and installing dialers will make the provision of residential service increasingly difficult. The problems caused by "zero-billing" customers, particularly in the residential market, have led ACC to consider placing call routers or least cost routing telephones in customers' homes. The costs of installing and maintaining such equipment, which BT need not incur, would likely be prohibitive.

#### **4. A transition period may be warranted to implement equal access**

ACC believes that dialing parity in the short term and presubscription in the long term are necessary to ensure fair market conditions in the U.K. ACC proposes a 1 to 1-1/2 year transition period to effect a gradual roll-out of equal access, but is willing to be flexible if BT demonstrates that this transition period should be longer. In any event, BT should be required to implement equal access by a date-certain. This would allow carriers to inform potential customers of a specific date on which they can presubscribe to a carrier and to engage in marketing in anticipation of presubscription. Moreover, during this transition period, customers should not be defaulted to the incumbent service provider. Otherwise, competing carriers must incur additional costs to remarket to their previous customers as well as their potential customers.

#### ***B. Access to Submarine Cable Backhaul Facilities***

ACC reiterates that BT must be required to provide access to bottleneck submarine cable backhaul facilities at reasonable rates, terms and conditions. Although the U.K. government expects competitive backhaul in the near future, BT is the current bottleneck provider of backhaul for most international facilities because of its historic role as the sole, and then the duopoly, international facilities-based carrier, and the long-term facilities planning process that led to BT's facilities acquisition. BT has substantial opportunity

to leverage its control of this bottleneck facility to the detriment of competitors. Given BT's control over backhaul facilities, ACC is concerned that BT could have the incentive and opportunity to refuse to provide access to backhaul facilities at reasonable rates, terms, and conditions.<sup>3</sup> This refusal could provide the combined BT/MCI company with an advantage in serving customers on the U.S.-U.K. route, and would place other carriers at a competitive disadvantage.<sup>4</sup> Accordingly, the FCC should condition its approval on access to backhaul facilities on an Indefeasible Right of Use ("IRU") basis and at reasonable and nondiscriminatory rates, terms and conditions until competitive backhaul becomes available.

ACC notes BT/MCI has acknowledged it is required under its license to provide backhaul at reasonable and nondiscriminatory rates, terms, and conditions. Notwithstanding this statement, the U.S. public interest requires the FCC specifically to require BT to provide such backhaul to ensure immediate and future U.S. carrier access to backhaul.<sup>5</sup> Without such conditions, BT can act to inhibit competition on the U.S.-U.K. route. Moreover, to the extent that BT's license conditions require it to provide such backhaul, the FCC's imposition of similar conditions on its approval of the BT/MCI merger should not impose an additional burden on BT. The FCC is independently required to impose these conditions if it determines that the U.S. public interest in preserving competition in the U.S.-international market so requires.

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<sup>3</sup> Although the United Kingdom has granted international facilities-based licenses, the inability of new licensees to obtain reasonable backhaul can effectively defer the onset of international competition in the United Kingdom.

<sup>4</sup> For this reason, ACC has delayed purchasing additional submarine cable capacity pending the resolution of outstanding backhaul issues.

<sup>5</sup> The FCC should scrutinize carefully any assertion that backhaul provided by BT is reasonable. Given MCI's recent order for four STM-1s on TAT 12/13, BT/MCI may have substantial need for backhaul capacity for its own services. The Commission should ensure that BT allocates backhaul capacity in a manner that does not favor BT/MCI due to its numerically superior capacity on international submarine cables.

### **C. *Unbundled Local Loops***

ACC also supports those commenters who urge the FCC to require BT to unbundle its local loops. Access to local loop elements would allow ACC to tailor its network in the most effective and efficient manner possible, by utilizing portions of BT's local network to provide its services. In addition to allowing ACC to provide its existing services more efficiently, such access would also allow ACC to begin providing local loop services where economical. Absent local loop unbundling, ACC would have to lease BT's entire local loop on a retail basis, including those elements for which ACC has no use, or construct its own loop.

The FCC should require local loop unbundling as a condition of approving BT/MCI's application notwithstanding OFTEL's concern about encouraging local loop construction.<sup>6</sup> Although ACC applauds OFTEL's attempt to introduce facilities-based competition in the local loop, ACC respectfully submits that real competition on the U.S.-U.K. route cannot occur unless U.S. carriers can compete with BT in the local loop stretch of that route. Currently, BT's control over that stretch is virtually absolute.<sup>7</sup> Thus, while BT/MCI can serve the local, long distance, and international needs of its customers without constructing new facilities in the United States, new entrants cannot serve, absent prohibitive investment in facilities, such needs of its customers. Nor will such new entrants have the opportunity to "phase in" the provision of local services under the current U.K. regime. Unlike BT/MCI, if a new entrant wants to provide local services, it must construct a local loop to serve its customers' local telephone service needs. This discrepancy will allow BT/MCI to attract more U.S. customers with U.S.-U.K. traffic, not because of BT/MCI's better

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<sup>6</sup> ACC does not believe that local loop unbundling would deter alternative infrastructure construction. Rather, it would facilitate the ability of competitors to provide local service without constructing new local loops, and therefore spur demand for further construction of facilities.

<sup>7</sup> Even once alternative networks are fully constructed, ACC is not confident of its ability to obtain local loop elements at reasonable prices.




service, but because of BT's artificially-exclusive ability to provide local services in the United Kingdom. Accordingly, BT's failure to unbundle its local loop will distort competition on the U.S.-U.K. route.

### III. CONCLUSION

For the foregoing reasons, ACC Corp. respectfully requests that the FCC approve the merger of BT and MCI only on the condition that BT provide equal access, access to backhaul facilities on an IRU basis at reasonable rates, terms and conditions, and unbundled local loops to allow U.S. carriers to compete with BT/MCI on the U.S.-U.K. route.

Respectfully Submitted,

  
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March 17, 1997

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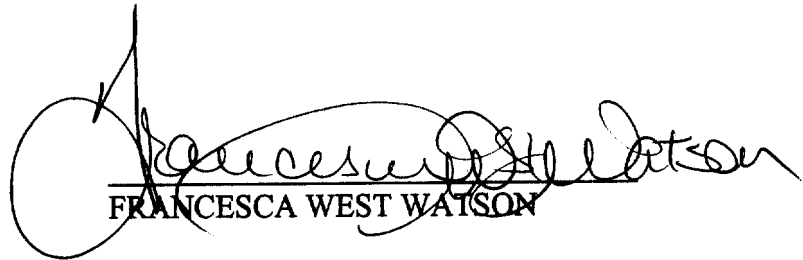
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